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No. 97-1798

In The

Supreme Court of the United States

October Term, 1997

BIRBROWER, MONTALBANO, CONDON & FRANK, P.C., and KEVIN F. HOBBS,

Petitioners,

vs.

SUPERIOR COURT OF SANTA CLARA COUNTY,

Respondent.

ESQ BUSINESS SERVICES, INC.,

Real Party in Interest.

On Petition For A Writ Of Certiorari To The Supreme Court Of California

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE SECURITIES INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION OF THE SECURITIES INDUSTRY ASSOCIATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS[1]

Amicus Curiae, the Securities Industry Association, respectfully moves, pursuant to rule 37.2 of the rules of this Court, for leave to file a brief amicus curiae in support of petitioner. The consent of counsel for petitioner has been granted; the consent of counsel for respondents has been sought but not obtained.

Amicus, the Securities Industry Association ("SIA"), is the principal trade association of the securities industry, with more than 800 member firms in the United States and Canada. As a member of the Securities Industry Conference on Arbitration, the SIA has been intimately involved in the arbitration process, the principal dispute resolution mechanism for the securities industry. One function of the SIA is to address judicial issues, as well as legislative and regulatory matters, affecting the securities industry. In the context of arbitration, the SIA has participated amicus curiae before this Court in *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 105 S.Ct. 1238, 84 L.Ed.2d (1985); *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S.Ct. 1212, 131 L.Ed.2d 76 (1995), and *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 115 S.Ct. 1920,131 L.Ed.2d 985 (1995).

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

The decision of the California Supreme Court, holding that a duly licensed member of the bar of another state engaged in the unauthorized practice of law in California by providing legal advice to a long-standing client in the negotiated resolution of a dispute arising in interstate commerce and subject to the Federal Arbitration Act, has highly disruptive consequences for the SIA's members and in-house counsel, as well as for other similarly situated national corporations. The SIA has a substantial interest in the resolution of this matter, as well as experience with the issues which may assist this Court in determining the importance of the case.

Accordingly, the views of the amicus should provide a useful supplement to the briefs of the parties.

DATED: June 5, 1998.

Respectfully submitted,

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BRIEF OF THE SECURITIES INDUSTRY ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF THE *AMICUS CURIAE*

As set forth in the foregoing motion for leave to file an amicus brief, the SIA is the principal trade association of the securities industry. Its 800 members, employing more than 380,000 individuals, are located throughout the United States and Canada and include investment banks, broker-dealers, and mutual fund companies. SIA members perform the full spectrum of professional securities activities, including retail and institutional brokerage, underwriting and other investment banking activities, money management, and investment advisory services. SIA members are responsible for over ninety percent of the securities business in the United States, virtually all of which is conducted through interstate commerce. The SIA is recognized as a spokesperson for the securities industry in general and the broker-dealer community in particular.

The securities industry has used arbitration as its principal dispute resolution vehicle for years, and the SIA has been intimately involved in the evolution of the arbitration process. The SIA and its members use arbitration to resolve thousands of customer claims annually.[1] Thus

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[1] After this Court's decision in *Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 96 L.Ed.2d 185 (1987), arbitration became the principal means of resolving securities disputes between investors and broker-dealers. Linda D. Fienberg, The NASD Securities Arbitration Report: A View From The Inside, 10 NO. 4 Insights 7 (April 1996). In 1997, approximately 5,000 claims were filed with the National Association of Securities

SIA members have a significant interest in ensuring that the process provides a mechanism for resolving disputes quickly, efficiently, economically and fairly. The ability of broker-dealers to be represented by counsel of their choice in arbitration proceedings is an important factor in ensuring the efficiency and economy of those proceedings. This freedom of choice ensures that broker-dealers are represented by the counsel most familiar with their company, the securities industry and its applicable arbitration process. Members of the SIA employ in excess of one thousand attorneys internally. Not surprisingly, the vast majority of the legal staffs of its members are located in New York.

The SIA has a substantial interest in this Court's accepting review of *Birbrower, Montalbano, Condon & Frank, et al.* v. *Superior Court (ESQ Business Services, Inc.)*, 17 Cal. 4th 119, 70 Cal. Rptr. 2d 304, 949 P.2d 1 (1998). The California Supreme Court's holding in *Birbrower* prevents broker-dealers from being represented by any counsel, including counsel employed internally, other than California State Bar members in arbitration proceedings in California involving the securities industry. *Id.* at 133.[2]

Dealers Regulation, Inc., the principal forum for the securities industry. Claims filed with the New York Stock Exchange and other self-regulatory organizations number approximately 1,000.

[2] Security industry proceedings are governed by arbitration rules adopted by the National Association of Securities Dealers Regulation, Inc. or by the various exchanges, such as the New York Stock Exchange Arbitration Rules, all of which are approved by the Securities and Exchange Commission pursuant to the Securities Exchange Act of 1934. 15 U.S.C. §§ 78c(a), 78f, 78o-3, 78s.

Birbrower presents a significant problem for broker-dealers because, since most such companies are not based in California, their internal corporate legal staff are generally not located in California and thus are not licensed in California. However, a broker-dealer's in-house counsel is often the best qualified to handle the arbitration by virtue of being the most familiar with the company, the securities industry and the applicable arbitration rules. The *Birbrower* holding thus disqualifies the lawyers most qualified to represent broker-dealers in securities arbitration proceedings. Moreover, coupled with California's broad interpretation of what constitutes that practice of law, *Birbrower* even prohibits in-house counsel from interviewing employees located in California in preparation for arbitration or litigation. Thus, it deprives in-house counsel of the ability to evaluate cases involving their employer.

SIA members believe that the *Birbrower* decision must be overruled or narrowed to enable their own internal in-house lawyers, admitted in states other than California, to represent them, the corporate employer, in securities arbitration proceedings in California.[3]

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[3] Ironically, SIA members' internal counsel can appear in California courts through admission pro hac vice, but, under *Birbrower*, not in the securities industry's arbitration process which this Court has approved. *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989).

SUMMARY OF ARGUMENT

California's unauthorized practice of law ("UPL") statutes should not be unreasonably interpreted so as to hinder the ability of broker-dealers engaged in interstate commerce to use the services of their internal counsel in the dispute resolution process established through the Exchange Act's rule approval mechanism. *Birbrower* does exactly that by rendering internal counsel for a broker-dealer unable to provide national service for that national client. *Birbrower's* holding prevents a company's in-house counsel from rendering legal advice or performing a broad range of legal services "in California" to his or her employer if not licensed in California.[4] *Birbrower's* definition of "in California" is broad enough to encompass even services rendered by a lawyer who is not physically present in California. *See Birbrower, supra,* 17 Cal.4th at 128 ("Our definition [of in California] does not necessarily depend on or require the unlicensed counsel's physical presence in the state.") Such an interpretation of UPL statutes unreasonably limits a lawyer's ability to effectively serve clients, unreasonably and impermissibly

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[4] *Birbrower* interprets California Business and Professions Code Section 6125 which prohibits the "practice of law in California" by anyone who is not an active member of the California bar. California has defined "practice of law" broadly to include the giving of legal advice and preparing legal instruments and contracts. *Birbrower, supra,* 17 Cal.4th at 128. The practice of federal law, foreign law or the law of a sister state is also within the purview of Section 6125. *Bluestein* v. *State Bar,* 13 Cal. 3d 162, 174, 118 Cal.Rptr. 175, 529 P.2d 599 (1974). *Birbrower* makes clear that participation in arbitration also constitutes the practice of law. *Birbrower, supra,* 17 Cal.4th at 133.

burdens interstate commerce and flies in the face of the federal self-regulatory scheme set forth in the Securities Exchange Act.

Corporate counsel for an SIA member must be able to represent their client/employer in all aspects of corporate legal affairs, regardless of the jurisdiction in which the matter arises. As the American Bar Association has noted, "[t]he business of a single client may involve legal problems in several states . . . Competent lawyers licensed in a sister state should not be encumbered and burdened with unreasonable regulation." ABA Committee on Ethics and Professional Responsibility, Formal Opinion 316 (1967). Nothing could be more accurate for SIA members, engaged throughout the United States in the securities business. *Birbrower* deprives SIA members of the services of experienced in-house counsel, thus increasing the cost of business in California, as well as the loss of the intangible benefits of in-house attorneys.

ARGUMENT

A. The *Birbrower* Decision Fails To Account For The Multi-jurisdictional Nature Of The Securities Industry.

Broker-dealers are involved daily in national and international financial markets. Those markets, and the securities business itself, are rarely limited to the state in which the firm's headquarters is located. The need to provide effective and efficient legal services to the highly regulated securities industry with such interstate legal concerns requires that jurisdictions not erect unnecessary barriers to interstate law practice. *See Restatement of the*

Law Governing Lawyers, Proposed Final Draft No. 2 (April 6, 1998) § 3, comment (b).[5]

Preventing a broker-dealer from being represented by either its in-house counsel or its primary outside counsel in securities arbitration proceedings in California simply because that lawyer is not licensed in California is an unnecessary barrier to interstate commerce. First, the rule does not advance the purpose of UPL statutes. UPL statutes are intended to protect California citizens from incompetent attorneys. *Birbrower, supra*, 17 Cal. 4th at 132. Attorneys admitted elsewhere are generally competent to try arbitrations, particularly since arbitrators need not follow the law. *Moncharsh* v. *Heily & Blase*, 3 Cal. 4th 1, 11 (1992). Furthermore, in many cases, including cases involving the securities industry, the law invoked is federal law.

Securities industry firms typically select an outside counsel and hire in-house counsel whom they believe are qualified to handle the firm's legal needs, whether those needs be local or multi-jurisdictional. After making this choice, they should not be forced to hire another lawyer to handle a matter they believe chosen counsel is competent and experienced to handle. Indeed, forcing them to hire another lawyer for a dispute in California burdens the company's conduct of business in California.[6]

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[5] Proposed Draft No. 2 was recently approved by the American Law Institute. Notably, the Reporter's Memorandum to the Draft criticizes *Birbrower* as "restrictive" on a lawyer's right to practice.

[6] Further, it has been noted that such restrictions on a person's choice of lawyer may well be "maintained for anti-

Other states have recognized this fact. As a partial solution, these states permit corporate in-house counsel to give legal advice to their employer without being licensed.[7] *See* Fla. St. Bar R. 17; Kan. Sup. Ct. R. 706; Ky. Sup. Ct. R. 2.111; Md. Bus. Occ. & Prof. Code. Ann. § 10-206(d); Minn. Sup. Ct. R. VI; Mo. Sup. Ct. R. 8.105; Ohio Sup. Ct. R VI § 4(A); Okla. Stat. Ann. App. Tit. V, § 6 (West 1995); S.C. Rules of Ct., R. 405; New Jersey Supreme Court Committee on Unauthorized Practice, Opinion No. 14, 1975 WL 2165 (1975). Additionally, Michigan permits a lawyer licensed in any state to practice law in Michigan if the lawyer is in the state temporarily and is engaged in a particular matter. Mich. Stat. Ann. § 600.916.

Second, as applied to securities arbitration, *Birbrower* does little to ensure the selection of competent counsel by the broker-dealer. Although studying for a state's bar exam may familiarize lawyers with that state's local law, such knowledge is not always required of lawyers participating in securities arbitration proceedings. State procedural and other legal rules generally do not apply to ADR proceedings.[8]

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competitive purposes or with such an effect." *See Restatement of Law Governing Lawyers*, Council Draft No. 13, Title 2, Introductory Note (October 1997).

[7] Florida has observed that a rule requiring all inside corporate counsel to be locally admitted does not "meet the legitimate needs of a modern economy." *In re Amendments to Rules Regulating Florida Bar (I)*, 593 So.2d 1035, 1036 (Fld. 1991).

[8] *See McRae* v. *Superior Court*, 221 Cal. App. 2d 166, 172, 34 Cal. Rptr. 346, 350 (1963) (no right to discovery in arbitration proceedings under either state or federal law); *Bowles Financial*

For example, by contract the broker-dealers and their investing clients typically determine the applicable arbitration rules, such as the National Association of Securities Dealers Arbitration Rules or the New York Stock Exchange Arbitration Rules or the rules of other self-regulatory organizations. *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S.Ct. 1248, 1256 (1989). Also, the law applicable in an arbitration proceeding may not be the law of the state in which the proceeding occurs. Choice of law provisions in arbitration agreements are generally enforceable to the extent they govern applicable substantive law. *See Id.; see also Coopers & Lybrand* v. *Superior Court (Schwartz)*, 212 Cal.App.3d 524, 538, 260 Cal. Rptr. 713, 722 (1989) (federal or state law may be displaced by arbitration agreement).

Finally, the rule is not necessary to subject lawyers who practice in California to the state's ethical rules. Even lawyers not licensed in California are subject to the state's disciplinary standards with respect to services performed in California. Ca. Rules of Ct., Rule 1-100(D)(2). Thus, there is generally no compelling reason to force a broker-dealer to retain a lawyer licensed in the state in which the securities arbitration proceeding will occur, especially where in-house counsel or regular outside

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Group, Inc. v. *Stifel, Nicolaus & Co., Inc.*, 22 F. 3d 1010, 1013 (10th Cir. 1994) (rules of evidence not applicable to arbitration proceeding); AAA Securities Arbitration Rules, Rule 32 (1993) (arbitrator need not conform to legal rules of evidence); *Advanced Micro Devices, Inc.* v. *Intel Corp.*, 9 Cal. 4th 362, 381, 36 Cal. Rptr. 2d 581, 593 (1994) (arbitrator may grant remedy court could not).

counsel, neither of whom may be licensed in California, are likely to be the most familiar with not only the company but also the securities industry, its arbitration rules, and the issues in dispute.

B. The *Birbrower* Holding Also Fails to Recognize the Importance of ADR Services.

Wholly apart from the unique role arbitration plays in the securities industry, alternative dispute resolution ("ADR") plays an increasingly important role in our legal system. It provides a fast and economical alternative to resolving a claim in the judicial system. The benefits of ADR have consistently been recognized by the federal legislative and judicial branches. For instance, the House of Representatives recently passed the Alternative Dispute Resolution Act of 1998. The Act, which requires litigants in civil cases filed in federal court to consider using ADR, was passed in an attempt to reduce daunting court backlogs. 1998 HR 3528. This Court's landmark ruling in *Moses H. Cone Mem. Hosp.* v. *Mercury Const. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927 941 (1983) reaffirmed that the Federal Arbitration Act establishes federal policy favoring arbitration. The United States Judiciary Conference and its various Advisory Committees have championed ADR. *Long Range Plan for the Federal Courts*, Judicial Conference of the United States, p. 134 (Dec. 1995).

California likewise recognizes the benefits of ADR. *See Madden* v. *Kaiser Foundation Hospitals*, 17 Cal.3d 699, 706-707, 131 Cal. Rptr. 882, 886, 552 P.2d 1178 (1976) ("Arbitration has become an accepted and favored method of resolving disputes . . . praised by the courts as

an expeditious and economical method of relieving overburdened civil calendars.").

However, *Birbrower* lessens a party's desire to participate in arbitration by limiting a party's choice of counsel to lawyers licensed to practice in California. Although not licensed in California, a company's corporate counsel or regular outside counsel, who is generally best suited to represent the company in ADR proceedings, could represent the corporate entity if the dispute were being resolved in court by applying for admission to practice "pro hac vice." Cal. Rules of Ct., Rule 983. No pro hac vice procedure is available for arbitration. By virtue of being involved in ADR, a favored method of dispute resolution, instead of litigation, corporate entities, including SIA members, are deprived of a means to be represented by counsel of their choice. No sound reason exists for California to limit participation in such proceedings to attorneys licensed in California.

Other states have recognized that permitting only licensed counsel to participate in arbitration proceedings is flawed. For example, in New York, an unlicensed lawyer who participates in arbitration proceedings is not guilty of unauthorized practice of law. *Williamson* v. *John D. Quinn Construction Corporation*, 537 F. Supp. 613, 616 (S.D.N.Y. 1982) (quoting a report by the Association of the Bar of the City of New York); *see also* Mich. Stat. Ann. Code § 600.916. New York's position on unauthorized practice recognizes not only the importance of ADR proceedings but also the uniqueness of such proceedings. Arbitration is an informal process which is vastly different from the judicial forum. *Alexander* v. *Gardner-Denver Company*, 415 U.S. 36, 58, 94 S.Ct. 1011, 1024, 39 L.Ed.2d

147 (1973) (citing differences in the fact-finding process, evidentiary concerns, and procedure). This Court has noted that it is this "informality of arbitral procedure that enables it to function as an efficient, inexpensive and expeditious means for dispute resolution." *Birbrower* both fails to recognize and undercuts the informality of arbitration proceedings by requiring representation by a licensed California lawyer.

Further, in contrast to California, New York's rule regarding unauthorized practice does not burden corporate entities by denying them counsel of their choice. A corporate entity involved in a dispute in California that is being resolved through arbitration must retain a California lawyer instead of using its in-house counsel, thereby incurring additional expense as well as intangible detriment. In New York, a corporate entity would not have to incur that same burden and expense. It has thus been noted that California's unauthorized practice law "primarily serves the interest of local sellers instead of buyers [which could be] called protectionism." Jeffery L. Jacobs, *An Unauthorized Practice*, 17 No.4 Of Counsel 2 (February 16, 1998). This observation rings true in light of the lack of other convincing justification for California's extreme limits on interstate practice.

CONCLUSION

For the foregoing reasons, the SIA urges the Court to grant the petition for certiorari.

DATED: June 5, 1998.

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